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IN THE

Supreme Court of the United States

October Term, 1967

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HO YEH SZE,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ABRAHAM LEBENKOFF AND JULES E. COVEN,
Attorneys for Petitioner
One East 42nd Street,
New York, N. Y. 10017.

LEBENKOFF & COVEN,
Of Counsel.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dismissing the petition to review an act of the Immigration and Naturalization Service.

Jurisdiction

The judgment of the Court of Appeals was entered on February 2, 1968. Jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Involved

1. In the Order to Show Cause in a deportation proceeding, is it necessary for the Government to specify the alternate country of deportation which they will request at the hearing?

2. Where the Government knows prior to the commencement of the hearing that they are going to make a request for an alternate country of deportation, are they required to advise the alien prior to the commencement of the hearing, that they are going to make such a request?

3. Is an alien given adequate notice of the content and nature of the proceeding where the Government, with knowledge, fails to advise the alien that they are going to make a request for an alternate country of deportation and such request is not made until after the alien concedes deportability?

Statutes Involved

Immigration and Nationality Act, 66 Stat. 163 (1952):

Section 243, 8 U. S. C. (1958 ed.) §1253,

"(a) The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any Island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent

Island. If the Government of the country designated by the alien fails finally to advise the Attorney General within three months following original injuiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject national, or citizen of such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory."

Section 242 of the Immigration and Nationality Act, 8 U. S. C., Section 1252. Subdivision (b) provides:

"A Special Inquiry Officer shall conduct proceedings under this section to determine the deportability of any alien * * *. Proceedings before a Special Inquiry Officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

Statement

The petitioner is a native and citizen of China who entered the United States as a seaman on February 8, 1967. He was afforded a hearing in deportation on June 28, 1967. Prior to the commencement of the deportation proceeding he was served with an Order to Show Cause stating that he was in the United States in violation of law and that he was subject to deportation. At the time of the hearing he conceded deportability. After deportability was conceded by the alien the Government made a request for the first time that Hong Kong be named as an alternate country of deportation. An objection was made at the hearing to the Government's requesting an alternate country of deportation at that time because the alien had not been advised that such a request was going to be made and, such request was not made until after deportability had been conceded. It is undisputed and it certainly appears obvious that the Government had knowledge before deportability was conceded that they were going to make such a request. The objection was further amplified by counsel stating that no specific section of Sec. 243(a) of the Immigration and Nationality Act was specified as the basis upon which the Government made the request that Hong Kong be named as an alternate country of deportation. The Special Inquiry Officer overruled objections of the petitioner's counsel and found the alien deportable, granted his application for voluntary departure, and ordered him deported to Formosa and, if Formosa did not accept him, to Hong Kong.

An appeal was taken to the Board of Immigration Appeals and the Board of Immigration Appeals on November 22, 1967 dismissed the appeal finding that the Order to Show Cause was not defective and that the Government need not advise the alien in the Order to Show Cause that

they were going to request an alternate country of deportation.

The petitioner then commenced an action, pursuant to Section 8 U. S. C. 1105(a) in the United States Court of Appeals for the Second Circuit alleging that the deportation order was invalid on the grounds that the Order to Show Cause was defective since the alien did not have adequate notice of the nature of the proceedings and, therefore, the order of deportation to Hong Kong was invalid. On February 2, 1968 the Court of Appeals denied the petition for review.

Reasons for Granting the Writ

The decision below raises a substantial question of law. The question as to whether or not the Order to Show Cause must contain a notice to the alien that the Government is going to request an alternate country of deportation, has never previously been decided by any court in the United States.

It is the petitioner's position that it is eminently unfair for the Government to withhold notice to the alien that they were going to make a request which the alien could not be aware of from the papers served upon him. In the case at the bar, the Government had full knowledge prior to any concessions made by the alien, that they were going to request that Hong Kong be named as an alternate country of deportation. This is self-evident since immediately after the alien conceded the deportability, the Government, for the first time, came forward with the proposition that the alien should be deported to Hong Kong.

In most deportation proceedings, deportability is conceded. The country of deportation has often become a litigated issue. For the Government not to inform the

alien in advance of the hearing that they are going to seek a country, other than his country of citizenship, as a country of deportation during the hearing, is prejudicial to the alien.

The Court of Appeals cited one case in support of the Government's position, to wit, *Haymes* v. *Landon,* 115 F. Supp. 506, 508 (S. D. Cal. 1953). The decision in that case indicated that the Order to Show Cause merely enables the Immigration authorities to obtain direct jurisdiction over the person of the alien and it sets "in motion an inquiry which may follow broad lines". However, in that case, the Government changed its position after obtaining information at the hearing which it, apparently, did not know about prior to the commencement of the proceeding, or the issuance of the Order to Show Cause. A different conclusion might have been reached if the Government was charged with having the knowledge prior to the commencement of the hearing. In the instant matter, there is no question but that the Government had full knowledge that they were going to make an alternate request. The Government's knowledge was not exposed until after objection had been made at the hearing and, even at that point, the Government's position was not verbalized until they were prodded by the Special Inquiry Officer.

The history and scope of the immigration hearing has been changed in recent years. However, the contents of the Order to Show Cause has not been amended to any great extent for a long period of time. Prior to 1961, a deportation hearing basically dealt with three problems: (1) Deportability; (2) Voluntary Departure; and (3) Suspension of Deportation. In October of 1961, the Judicial Review Act, Section 8, U. S. C. 1105(a) was passed by Congress placing initial jurisdiction of matters decided by the Special Inquiry Officer in the United States Court

of Appeals. The Government, in an effort to place as many items as possible before the Special Inquiry Officer, amended their regulations in January of 1962. There, for the first time, the Administrative Officer (the District Director) was relieved of the power to choose the country of deportation pursuant to Section 243(a) and this matter was then placed before the Special Inquiry Officer. The power to direct a country of deportation, in addition to other matters, was given to the Special Inquiry Officer. However, no substantial amendment to the Order to Show Cause was made. The hearing before a Special Inquiry Officer is an adversary proceeding. Once the country of deportation became an issue in the adversary proceeding, it is obvious to the writer that a different standard had to be followed before a Special Inquiry Officer could direct a country of deportation pursuant to Section 243(a). Since it was an adversary proceeding certain obligations were placed upon the Government. It is contended that one of these was the obligation on the part of the Government to advise the alien of all matters that would be taken up at the deportation hearing. If the Government was going to request an alternate country of deportation they, certainly, should be obligated to advise the alien that they intended to make such a request. If the Government did not know at the time of the commencement of the hearing that such a request was going to be made, the case of *Haymes* v. *Landon* might be applicable, but these are not the facts. It is quite clear that the Government was not willing or desirous of advising the alien of the nature of the proceedings until after the alien had made certain concessions. How can the alien, or his attorney, be properly prepared if the Government withholds essential notice of an issue which is so important. When the Government says they do not know that an alternate country of deportation will be considered, they are making a "tongue in cheek" statement.

It must also be pointed out to this Court that when the Government finally did state they were going to request Hong Kong, it was done orally rather than in writing. The basis on which they were making the request that Hong Kong be named was never specified as to the particular section of 243(a) on which the Government was relying. Must the alien and his attorney be compelled to guess which section of the law the Government is relying upon? Section 243(a) has seven subdivisions. How can anyone know which subdivision the Government is relying on unless the Government so states. In the case of *Fougerhouse* v. *Brownell,* 163 F. Supp. 580, the Court held that the notice of charges must be written and a lodged charge must also be written. In the case of *MacLeod* v. *I. N. S.,* 327 F. [illegible] 453, the Court held that the Order to Show Cause failed to contain factual allegations required by regulations and it also failed to completely advise the alien of the notice of charges he must face. In the case of *Kwong Hai Chew* v. *Colding,* 73 S. Ct. 472, 344 U. S. 590, the Court held that an alien is entitled to notice of the charge against him. In *Hirsch* v. *I. N. S.,* 308 F. 2d 562, the Court there held that an alien in a deportation proceeding was entitled to a hearing and a statement of charges against him, even before the enactment of the statute affording these rights.

Although deportation proceedings are not criminal in nature, it has been held many times that a great hardship is produced as a result of deportation. In a criminal matter, a judge would not think of accepting a plea of guilty until he was sure that the person knew the consequences of his plea, including the maximum possible jail sentence. The advice that a maximum jail sentence was less than, in fact, the law stated, would certainly nullify the guilty plea.

These are the facts that parallel the instant matter. The alien pleaded to the charge of deportability. After gaining this concession, the Government made the request that Hong Kong be named as an alternate country of deportation. The entire hearing might have taken on a different posture if the Government had advised the alien in the notice of hearing (Order to Show Cause) that it was going to make such additional request.

From all of the foregoing, it can readily be seen that there is a substantial question of law in this matter and that the decision of the Court of Appeals below was in error and that a useful purpose would be served by having certiorari granted in this case.

CONCLUSION

Wherefore, in consideration of the magnitude of the questions presented, and in the interest of justice, it is respectfully prayed that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
March 13, 1968.

Respectfully submitted,

ABRAHAM LEBENKOFF AND JULES E. COVEN,
Attorneys for Petitioner,
One East 42nd Street,
New York, N. Y. 10017.

LEBENKOFF & COVEN,
Of Counsel

Opinion of United States Court of Appeals for the Second Circuit

MEDINA, *Circuit Judge*:

Petitioner Ho Yeh Sze seeks review pursuant to 8 U. S. C., Section 1105a of a final order of the Board of Immigration Appeals which dismissed his appeal from an order of a Special Inquiry Officer. The Special Inquiry Officer had found that petitioner was deportable under Section 241 (a)(2) of the Immigration and Nationality Act, 8 U. S. C., Section 1251(a)(2), as he was a non-immigrant crewman admitted on a temporary basis who had overstayed the authorized period. Petitioner does not dispute the finding that he is now illegally in the country. However, he does claim that the order to show cause which initiated the deportation proceedings in his case was fatally defective because it failed to set forth the name of the country to which the Government would request deportation and the specific subdivision of Section 243(a) of the Act, 8 U. S. C., Section 1253(a), pursuant to which the request would be made. We have examined petitioner's contentions with some care and find them to be without merit. Our reasons follow.

Section 242 of the Immigration and Nationality Act, 8 U. S. C., Section 1252, sets out the procedure for dealing with the deportation of aliens. Subsection (b) provides:

> A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien * * *. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this chapter, as the Attorney General shall prescribe. Such regulations shall include requirements that—
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> (1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the

charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

Pursuant to the authorization contained in Section 242, the Immigration and Naturalization Service has promulgated regulations which provide that all deportation proceedings will be commenced by the issuance and service of an order to show cause. 8 C. F. R. Section 242.1. It is abundantly clear that the contents of the typical order to show cause, as prescribed by the Regulations, meet the standard of Section 242.[1] Petitioner has acknowledged that he received the customary order to show cause. However, he has contended that the order to show cause was deficient since it

[1] 8 C. F. R. Section 242.1. *Order to show cause and notice of hearing.*

* * * * *

(b) *Statement of nature of proceeding.* The order to show cause will contain a statement of the nature of the proceeding, the legal authority under which the proceeding is conducted, a concise statement of factual allegations informing the respondent of the acts or conduct alleged to be in violation of the law, and a designation of the charges against the respondent and of the statutory provisions alleged to have been violated. The order

(footnote continued on next page)

failed to specify that he might be deported to Hong Kong and did not indicate the basis on which such a request would be made.

Section 243 of the Act, 8 U. S. C., Section 1253, specifies the countries to which an alien may be deported.[2] Thus, initially an alien is permitted to designate the country to

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will require the respondent to show cause why he should not be deported. The order will call upon the respondent to appear before a special inquiry officer for hearing at a time and place stated in the order, not less than seven days, after the service of such order, except that where the issuing officer, in his discretion, believes that the public interest, safety, or security so requires, he may provide in the order for a shorter period. The issuing officer may, in his discretion, fix a shorter period in any other case at the request of and for the convenience of the respondent.

[2] Section 1253. *Countries to which aliens shall be deported—Acceptance by designated country; deportation upon nonacceptance by country*

(a) The deportation of an alien in the United States provided for in this chapter, or any other Act or treaty, shall be directed by the Attorney General to a country promptly designated by the alien if that country is willing to accept him into its territory, unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States. No alien shall be permitted to make more than one such designation, nor shall any alien designate, as the place to which he wishes to be deported, any foreign territory contiguous to the United States or any island adjacent thereto or adjacent to the United States unless such alien is a native, citizen, subject, or national of, or had a residence in such designated foreign contiguous territory or adjacent island. If the government of the country designated by the alien fails finally to advise the Attorney General within three months following original inquiry whether that government will or will not accept such alien into its territory, such designation may thereafter be disregarded. Thereupon deportation of such alien shall be directed to any country of which such alien is a subject na-

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which he wishes to be deported. In the absence of such a designation, or if the chosen country refuses to accept the alien, or if the Attorney General finds that deportation to the particular country would be prejudicial to the interests of the United States, deportation may then be ordered to any country where the alien is a subject, national or a citizen. If the preceding country refuses to accept the alien or if the country fails to notify the Attorney General of its acceptance within three months or what the Attorney General deems to be a reasonable time, then deportation may

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tional, or citizen if such country is willing to accept him into its territory. If the government of such country fails finally to advise the Attorney General or the alien within three months following the date of original inquiry, or within such other period as the Attorney General shall deem reasonable under the circumstances in a particular case, whether that government will or will not accept such alien into its territory, then such deportation shall be directed by the Attorney General within his discretion and without necessarily giving any priority or preference because of their order as herein set forth either—

(1) to the country from which such alien last entered the United States;

(2) to the country in which is located the foreign port at which such alien embarked for the United States or for foreign contiguous territory;

(3) to the country in which he was born;

(4) to the country in which the place of his birth is situated at the time he is ordered deported;

(5) to any country in which he resided prior to entering the country from which he entered the United States;

(6) to the country which had sovereignty over the birthplace of the alien at the time of his birth; or

(7) if deportation to any of the foregoing places or countries is impracticable, inadvisable, or impossible, then to any country which is willing to accept such alien into its territory.

be ordered to any country which satisfies the requirements of one of the subsections of Section 243. Thus in the instant case, at the deportation hearing, petitioner's counsel informed the Inquiry Officer that petitioner did not wish to exercise his privilege of selecting a country for deportation. The officer thereupon proceeded to the second stage and asked counsel if there would be an objection under Section 243(h), 8 U. S. C., Section 1253(h),[3] if petitioner was deported to his country of nationality, namely Formosa. After counsel responded that there would be no Section 243(h) application, the Special Inquiry Officer asked the Government whether it sought an alternative country as the place of deportation and the suggestion of Hong Kong followed. This request was premised on the fact that Hong Kong qualified under at least three subdivisions of 243(a).[4] At this juncture petitioner's counsel interposed his objection relating to the alleged defect in the order to show cause. While the Special Inquiry Officer rejected this contention, he offered petitioner an adjournment in order to give him an opportunity to deal adequately with the question whether Hong Kong was a country which should be included in the direction of deportation. This offer was rejected.

We fail to see any validity in petitioner's argument and are in substantial agreement with the opinion of the Board

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[3] Section 1253. *Countries to which aliens shall be deported* * * *. *Withholding of deportation*

> (h) The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion, or political opinion and for such period of time as he deems to be necessary for such reason.

[4] These are subdivisions (1), (2) and (5). The Special Inquiry Officer also felt that since petitioner was previously a resident of Hong Kong and had embarked from there, it was thought that he would be welcome there. Section 243(a)(7).

of Immigration Appeals. An order to show cause merely enables the Immigration authorities to obtain direct jurisdiction over the person of the alien and it sets "in motion an inquiry which may follow broad lines, possibly eliminating the presently alleged ground for deportation and substituting another, and possibly eliminating all so that the alien's residence here may remain undisturbed." *Haymes* v. *Landon*, 115 F. Supp. 506, 508 (S. D. Cal. 1953). In other words, the issuance and personal service of the order to show cause is the prescribed method of commencing the proceeding. There is no necessity at this early stage in the deportation process to specify the country to which an alien might be deported nor the grounds on which he may be deported to a particular country. In the first place, the alien may never actually be deported and in that case the question of the place of deportation becomes moot. Secondly, the alternative deportation provisions contained in Section 243(a)(1)-(7) only come into play if the alien has not been able to satisfactorily designate a country or if his country of nationality rejects him. Neither the specific provisions of the immigration statute nor the regulations issued thereunder, require, in the order to show cause, the designation of the country to which the Immigration Service proposes to deport an alien. We agree with the Board of Immigration Appeals that there is no sound legal logic for imposing such a requirement. The petitioner in the instant case was given a fair hearing and had an adequate opportunity in which to contest the possibility of his deportation to Hong Kong.[5]

The statutory stay is hereby vacated.

Petition denied.

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[5] Only recently we have refused to reverse a denial of an application for a stay of deportation, under Section 243(h) of the Act, sought by alien crewmen who were awaiting deportation to Hong Kong. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, Docket No. 31842 (2d Cir. 1967) (Slip Sheet at 277).